PL. AR. ARUNASALAN CHETTIAR & ORS. v. AR. PL. PALANIAPPA CHETTIAR

[F.C. (Azmi C.J. (Malaya), Ong Hock Thye and Suffian F.JJ.) November 4, 1968]

[Kuala Lumpur—Federal Court Civil Appeal No. X21 of 1968]

Hindu Law — Mitakshara law — Joint Hindu family — Whether member of joint Hindu family can sue the manager for accounts prior to the date of decree for partition — Member entirely excluded from enjoyment of family property.

The question that arose in this case was whether a member of a joint Hindu family can sue the *karta* or manager for accounts for a period anterior to the date of the decree for partition. The respondent in this case had been entirely excluded from enjoyment of the family property and he had to establish his right by litigation in India.

Held: if a member of a joint Hindu family is wrongfully excluded from the enjoyment of the family property and subsequently establishes his position as a member, his right of action accrues at the date of his exclusion and he is therefore entitled as from that time to an account of the family property.

Cases referred to:—

(1) *Babbur Basavayya & Ors.* v. *Babburu Guravayya & Anor.* A.I.R. 1951 Madras 938, 939 & 940.

(2) *T.S. Swaminatha Udayar* v. *T.S. Gopalaswami Odayer & Ors.* A.I.R. 1939 Madras 81.

(3) *Sukhdeo & Anor.* v. *Basdeo & Ors.* A.I.R. 1935 All 594 at p. 597.

(4) *Bhivrav* v. *Setaram* (1895), I.L.R. 19 Bom. 532.

(5) *Attorney-General of Ceylon* v. *Ar. Arunachalam Chettiar & Ors.* [1958] M.L.J. 39 at p. 43.

The following authorities were also cited in argument: *C.M. Row's*: Treatise of the Law of Injunctions by B.R. Verma, 3rd Ed. Vol. 1, pp. 839 & 840; *Baij Nath Prasad* v. *Ram Gopal Lachmi Narayan*, A.I.R. 1939 Cal. 92(a); *In re the estate of T.M.R.M. Vengadasalam Chettiar, decd.* [1941] M.L.J. 145; *Sakharam Mahadev Dange* v. *Hari Krishna Dange*, (1880-82), I.L.R. 6 Bombay 113; *Jonnagadla Seethama* v. *Jonnagadla Veerana Chetty*, A.I.R. 1950 Madras p. 785(c); *Mayne* on Hindu Law 11th Ed. p. 517-519; *Dicey's* Conflict of Laws, 7th Ed. p. 1087; and *C.V. Vythianatha Iyer* v. *C.V. Varadaraja Iyer*, A.I.R. 1938 Madras 841.

FEDERAL COURT.

Atma Singh Gill for the appellants.

A.D. Rajah for the respondent.

Cur. Adv. Vult.

Azmi C.J. (Malaya): This is an appeal against the order of the High Court at Seremban.

It is necessary to deal with the history of the litigation from the start.

In 1950, the plaintiff, the respondent in this appeal instituted proceedings against the defendants (the appellants in this appeal) in the subordinate court of Devakottai in Originating Suit No. 70 of 1950. In that suit the plaintiff sued for various reliefs, the most important of which was for directing of the movable and immovable properties belonging to the joint family consisting of himself and the defendants to be determined and divided into three shares and for the allotment of one share to him. The other reliefs were for directing the first defendant to produce into court, all the accounts, documents and vouchers pertaining to the joint family of the parties for determining the payment of the amount payable separately from out of the joint family funds and for granting incidental and necessary reliefs. The subordinate court, in its judgment declared that the plaintiff was entitled to partition and possession of 1/30th share of certain properties decribed in a schedule and also to partition and separate possession of 1/3rd of another set of properties also referred to in the schedule but in other respects dismissed the plaintiff's suit.

Before that judgment was given, the plaintiff also brought a suit in Seremban — Suit No. 34 of 1951 in which the plaintiff claimed that the property in Port Dickson belonged to a Hindu Joint Family of which he was a coparcener.

The plaintiff appealed against the judgment of the subordinate court to the Divisional Court in Madras and on 3rd December 1954, the parties in the Seremban suit obtained an order of the court by consent to the effect that they undertook to abide in the proceedings instituted in India on the issue arising in the Originating Suit No. 70 of 1950 as to whether the firm of PL. AR. Port Dickson and the assets thereof belonged to a Hindu Joint Family as alleged by the plaintiff or were the separate exclusive property of the defendants as alleged by them.

The Supreme Court of India finally disposed of the matter. In its judgment dated 25th October 1963, among other things the Supreme Court made the following declarations:—

"There will be a declaration that the PL. AR. firm at Port Dickson and the assets thereof are the estate of the Joint Hindu Family consisting of the plaintiff and the defendants, and the plaintiff is entitled to a third share therein. It is declared that division of the assets of the business will be as agreed by the parties before the High Court at Seremban in Civil Suit No. 34 of 1951 as recorded in the decree in the order of the court on 3rd December 1954 and further before the High Court of Madras in C.M.P. 6218 of 1956. Appropriate directions to be obtained by the parties in Suit No. 34 of 1951 from the High Court at Seremban."

It is also necessary I think to refer to the following part of the judgment of the Supreme Court:—

"Having carefully considered the contents of the letters and the conduct of the first defendant in allowing himself to be assessed to tax *qua* the income of the PL. AR. Firm as a Hindu undivided family and the evidence about the commencement and consolidation of that business with the aid of funds which originally belonged to the larger joint family business, and viewed in the light of the character of the business which was of the same nature as the original joint family business,

we have no doubt that the PL. AR. Port Dickson business was started and conducted by the first defendant for and on behalf of himself and his sons and was not his exclusive business."

It is apparent from that passage of the judgment that the first defendant had from the beginning treated the PL. AR. business as his own and thereby had deprived the plaintiff from the enjoyment of that property as coparcener of the joint family property.

In 1964 the plaintiff applied in the Seremban Civil Suit 34 of 1951 by way of motion for final judgment to be entered pursuant to the order of that court dated 3rd December 1954 and for the appointment of a receiver to take the necessary accounts and consequential directions. The Seremban High Court made the order as prayed. On appeal to the Federal Court the order of the Seremban High Court was varied by the addition of the following:—

(1) That the issues adjudicated upon by the Supreme Court of India in the court of subordinate judge, Devakottai Original Suit No. 70 of 1950 be binding on the parties when taking account."

On a subsequent date, the plaintiff made a further application by way of summons in chambers praying, among other things, for an order that the first defendant do file an account of his management of the PL. AR. Firm from the date of commencement within one month from the order

(2) That the plaintiff be at liberty to satisfy and surcharge the said accounts.

(3) An enquiry be held to ascertain what part of the amount found due to the plaintiff shall be paid from the said joint Hindu estate and what part to be paid by the first defendant.

Ismail Khan J., as he then was, allowed the prayer in paragraph (1) with an amendment that the time for filing the account be made within 2 months from the date of this order. It is now against that order that the defendant brought this appeal before us.

There are several grounds of appeal but the substantial one appears to be to the effect that the plaintiff was not entitled to have the accounts of the family property from the commencement of its inception on the ground that the personal law of this family being the *Mitakshara* law, he as a member of a joint Hindu family cannot sue his manager for accounts for a period anterior to the date of the decree for partition. In support counsel for the appellant read to us certain extracts from *C.M. Rows*: Treatise of the Law of Injunctions by B.R. Verma 3rd Edn. Vol. 1 pages 839 and 840-42 and cited also *Babbur Basavayya & Ors.* v. *Babburu Guravayya & Anor.*[1] and *T.S. Swaminatha Udayar* v. *T.S. Gopalaswami Odayer & Ors.*[2]

In the case of *Sukhdeo & Anor.* v. *Basdeo & Ors.*[3] the High Court at Allahabad had this to say:—

"A cross-objection has been filed by the plaintiffs as regards the refusal by the court below to order Sukhdeo to render account of his dealings with the family property. It is settled law that in the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family a corpacener seeking partition is not entitled to call upon the manager to account for his past dealings with the family property. The coparcener is entitled only to an account of the joint family property as it exists on the date he demands partition."

It was, however, urged on behalf of the respondent that where a coparcener has been entirely excluded from the enjoyment of the family property he is entitled to an account of the income derived from the family property and to have his share of the income ascertained and paid to him. In other words, he is entitled to what are called *mesne* profits. The question of a manager's liability to account and the right to *mesne* profits previous to partition was dealt with in the case of *Bhivrav* v. *Setaram*,[4] and the headnote reads as follows:—

"Although, as a general rule, no member of an undivided Hindu family can have any claim to *mesne* profits previous to partition, yet *mesne* profits may be allowed on partition where one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member who claimed to treat it as impartible, and, therefore. exclusively his own."

The following passage appears at page 536 of the judgment:—

"On a careful consideration of these authorities, we feel satisfied that (1) while, as a general rule, it is true in the words of Mr. Mayne (5th Ed., para. 429) that 'no member' of an undivided Hindu family 'can have any claim to *mesne* profits previous to partition, because it is assumed that all surplus profits have, from time to time, been applied for the benefit' of the family, yet (2) that this is only a presumption, and that '*mesne* profits may be allowed on partition when one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member of the family who claimed a right to treat it as impartible, and therefore exclusively his own."

I will now consider the fifth and sixth grounds of appeal, namely to the effect that no where in the judgment of the Supreme Court of India was it adjudicated that the plaintiff was entitled to an account to the PL. AR. Firm right from the inception, except, in the case of the rupees 3,800. That is quite true but in my view it was agreed by both parties that the judgment of the Supreme Court in reference to the immovable property situated in Malaysia was to be purely a declaratory judgment since the Supreme Court of India had no jurisdiction to adjudicate on immovable property outside its jurisdiction. In my view, therefore, by the last part of the order of the Supreme Court which I had previously quoted namely, "Approjriate directions to be obtained by the parties in Suit No. 34 of 1951 from the High Court at Seremban", it was intended that the court in this country would give any such necessary orders for the purpose of carrying out the declaratory judgment of the

Supreme Court of India and that direction is wide enough to include any necessary order for taking accounts. I would therefore say that these grounds must fail.

Grounds of appeal Nos. (7) and (8) read as follows:—

(7) That the learned trial judge misdirected himself, that the account books were with the first defendant, when there were concurrent and conclusive findings by the Indian judges that the account books which had been brought to India by the first defendant had been taken away by the plaintiff by breaking into the defendant's house, to enable him to formulate his action.

(8) That the learned trial judge failed to appreciate that in view of the said account books being in the possession of the plaintiff it was impossible for the first defendant to render any accounts, within 2 months of the order to which accounts in any event the plaintiff was not entitled according to the personal law applicable to the parties.

Counsel for the first defendant pointed out to us that the learned judge, Ismail Khan J., failed to take into account the finding of fact made by the subordinate court in Madras to the effect that the account books in question were taken away by the plaintiff. There was no direct evidence to show that the plaintiff took away the books.

The learned subordinate court judge apparently accepted the evidence of the first defendant that he kept the books in a room in the house and that he was forced to leave the house subsequently. From that he made an inference that the plaintiff had opened the rooms and almeriahs and taken away the account books. In view of the fact that the family dispute had already arisen long before this alleged incident, it is hard to believe that the first defendant would have parted with the books so easily. In the circumstances I would agree with the finding made by Ismail Khan J. I would therefore dismiss the appeal with costs.

Suffian F.J. concurred.

Ong Hock Thye F.J.: Litigation between these parties commenced in India in 1950 and in the High Court at Seremban in 1951, with the respondent Palaniappa as plaintiff. The action in Malaya was stayed upon an undertaking given by Arunasalam, the first defendant, to abide by any final decree or decision of the courts in India. On October 25, 1963 the Supreme Court of India pronounced judgment declaring "that the PL. AR. Firm at Port Dickson and the assets thereof are the estate of the joint Hindu family consisting of the plaintiff and the defendants and that the plaintiff is entitled to a third share therein." It was further ordered *inter alia* that appropriate directions be obtained from the High Court at Seremban.

In consequence of the above judgment an order was made by the High Court at Seremban on July 11, 1964 declaring, in identical terms, that the plaintiff is entitled to a one-third share in the assets of the PL. AR. Firm and ordering, besides partition thereof, that "an account be taken of the movable and immovable properties of the joint Hindu family and the amounts due to the plaintiff from the joint Hindu family or from the first defendant", as well as inquiries "to ascertain what part of the amount found due to the plaintiff shall be paid from the joint Hindu family estate and what part thereof shall be paid by the first defendant." Upon appeal therefrom, the above orders were confirmed on March 14, 1966 by the Federal Court of Malaysia, with an amendment added thereto, namely: "that the issues adjudicated upon by the Supreme Court of India . . . . be binding on the parties when taking accounts." Unfortunately, the order omitted to state from what date the accounting should commence, but probably it was considered superfluous to do so.

Upon an application made in due course for consequential orders and directions, Ismail Khan J. on March 21, 1968 directed that the first defendant do within two months file an account of his management of the PL. AR. Firm from the date of its commencement, which was August 22, 1926 by the judgment of the Indian Supreme Court. The appeal is by Arunasalam against this part of the order.

It is common ground that *Mitakshara* law is the personal law of the parties. It is also clear from the judgment of the Supreme Court of India that Palaniappa had been forced into litigation by reason of Arunasalam's claim that the PL. AR. Firm belonged to himself solely and personally. Consequently it cannot now be gainsaid that Palaniappa's coparcenary rights in the joint Hindu family estate from its very beginning had wrongly been denied him by Arunasalam as the *karta* or manager thereof.

The question now raised by the appellant is whether he is liable to render accounts from the commencement of business of the PL. AR. Firm or from the date the partition was decreed.

Mr. Atma Singh, counsel for the appellant, has argued with great persuasiveness that under *Mitakshara* law a member of a joint Hindu family cannot sue his *karta* for accounts prior to the date of a decree for partition. This is true because a coparcener "merely had a right to be maintained by the *karta* out of the common fund to an extent which was at the *karta's* absolute discretion": *per* Gratien J., see *Attorney-General of Ceylon* v. *Ar. Arunachalam Chettiar & Ors.*[5] Counsel contends that, as it was denied throughout that the respondent was a coparcener, proof whereof rested on the respondent, the latter had no status, nor any share in the estate — which is true — until proof was given to establish his status and a decree pro-

nounced thereon. Ordinarily, severance of status under *Mitakshara* law takes place, where coparcenary is admitted, on the date a suit for partition was filed — which in this case, would be on April 2, 1951 — or, where the question of status and the definitive share of the claimant remains to be determined by the court, upon a final decree being passed establishing the claimant's rights. As the respondent was unsuccessful on the question of fact both in the court of the subordinate judge at Devakottai and in the High Court at Madras, until he finally won on the issue in the Supreme Court in New Delhi, it was submitted that there was no severance until the decision in the final appeal, which was October 25, 1963. Accordingly there was no liability on the part of the appellant to account for his management prior to that date.

With respect I am unable to agree entirely with this contention. The salient fact is that, on the appellant's own admission, the respondent had been wholly excluded from participation in the enjoyment of any benefit whatsoever of what the court has held to be the common fund. By the very fact of his surviving the long and tedious litigation until decree the Supreme Court of India has now quantified his interest. The position would be vastly different had he died before the decree. Having succeeded to this extent, is he nevertheless to be denied all remedy for the past wrong done to him? The answer is to be found in the judgment again of Gratien J. quoted with approval by their Lordships of the Privy Council (*ibid*) as follows:—

> "He could, if excluded entirely from the benefits of joint enjoyment, have taken appropriate proceedings against the *karta* . . . . to obtain compensation for his earlier exclusion."

With respect I regard this statement of principle as binding authority. Otherwise, assuming counsel's contention to be correct, the appellant could with impunity have played ducks and drakes with the joint property under his charge by reason of being absolutely accountable to no one. What if he had utilised the common fund, for instance, in purchasing property personally for himself? If the respondent is denied an account, how would it be possible to trace and follow such property as property to which the respondent is entitled to claim his share? Since the exclusion was clearly wrongful, to uphold the appellant's repudiation of liability to account during the period of exclusion would be tantamount to condoning a wrong. It is an axiomatic rule of law that a party cannot take advantage of his own wrong. The instant case cannot be an exception to the rule. Nor do I think there should be any grounds for reluctance on the part of the appellant to render full accounts if he has nothing to fear.

The broad principles relating to accounts by the *karta* are thus stated in *Mayne's Hindu Law & Usage* (11th Ed.) pp. 517-519 as follows:—

> "A member who seeks partition is entitled to an account of the family property as it stands at the date of partition, but is not entitled to open up past accounts or to claim relief against past inequality of enjoyment of the family property. All that he is entitled to is an account of the family property as it exists at the time he demands partition. If he alleges and proves past acts of fraud or misappropriation on the part of the manager the rule would not apply. He would then be entitled to a full account for the whole period of management, the object in such a case being to ascertain not merely what the family property available for distribution is, but what it should be but for such acts of fraud, misappropriation or reckless waste; and in no case does it mean that the other members of the family are bound to accept the word of the *karta* as to what the divisible properties are. For particular properties which are proved to have come into his hands, the manager is bound to account and it is not enough for him to say that he has no longer got those assets. *Cases may also occur where the enquiry as to what the family property is at the time of partition may necessarily involve the taking of past accounts and in such cases, the other members are entitled to ask for and the court can order an account to be taken of the joint properties.* But the taking of such accounts must proceed on the footing that its object is not to call upon the manager to justify past transactions, but to ascertain what is the joint property actually in his hands at the time of partition. As from the date when the right to partition accrues, however, the manager will be bound to render an account of the same nature as would be demanded from a trustee or agent. The time from which such an account can be demanded would seem to be the date of the severance. It will be the date of the first unequivocal declaration by a member of the family of his desire to enforce a partition. So, *if a member of a joint family is wrongfully excluded from the enjoyment of the family property and subsequently establishes his position as a member, his right of action accrues at the date of his exclusion; and he will be entitled as from that time to an account such as would have to be rendered by a trustee.*"

This, of course, does not mean accounting on the footing of wilful default, nor would there be any liability for loss by negligence. The *karta's* "absolute discretion" in the management of the joint estate draws a clear line as to the nature and extent of the accounts to be rendered: they are required because otherwise any inquiry to ascertain what properties belong to the joint estate would be frustrated.

It remains only for me to touch briefly on two other incidental matters. As to the question of limitation and the *lex fori*, I think it is sufficient to state that:—

> "No period of limitation . . . . shall apply to an action by a beneficiary under a trust, being an action . . . . to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use." (See section 22(1) of the Limitation Ordinance, 1953, reproducing section 19(1) of the English Limitation Act 1939).

As to who actually has possession of the relevant account books, it is implicit in the order made by Ismail Khan J. that he was satisfied they were and are in the appellant's

possession. With respect I am in full agreement with him, for Exhibit "A1" annexed to the affidavit of Palaniappa sworn on December 28, 1967 shows that various books of relevant years, as well as other documents, produced in the court of the subordinate judge at Devakottai, were duly returned to the appellant's advocate in India and acknowledged by the latter on August 18, 1966. It is, furthermore, difficult to imagine that the appellant, having claimed throughout that he was sole proprietor of the PL. A.R. Firm, would have parted at any time with the possession of some material books, while retaining others, to any other person, least of all to his opponent. And it is to be remembered that they had been estranged since 1949, if not earlier.

Since the order of Ismail Khan J. has not been carried out by reason of this appeal, there will be an order extending the time for filing of accounts, as ordered, allowing the appellants three months from the date hereof to comply. The appeal is dismissed with costs; the deposit of $500 to be paid out to the respondent to account of his taxed costs.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Co.; Lovelace & Hastings.*

GAN SOO SWEE & ANOR. v. RAMOO

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Chua J.) November 7, 1968]

[Singapore—Federal Court Civil Appeal No. Y24 of 1968]

Negligence — Highway — Junction controlled by traffic lights — Traffic accident — Defective traffic lights — Onus of proof.

Damages — Personal injuries — Accident at juntion controlled by traffic lights — Defective traffic lights — Whether either or both drivers were negligent.

This was an appeal against the decision of the High Court, ([1968] 2 M.L.J. 66) which had given judgment for the plaintiff in his claim for damages for personal injuries sustained as a result of a collision between a taxi and a lorry at a junction. The junction was controlled by traffic lights and it appeared that at the relevant time the traffic lights were defective. Buttrose J. found that the lights were defective but held that the drivers of the taxi and the lorry were aware of this and he apportioned the blame at 75% on the lorry driver and 25% on the driver of the taxi. The appellants appealed.

Held, allowing the appeal: there was no evidence that either the driver of the lorry or the driver of the taxi knew that the traffic lights were defective and in the circumstances the plaintiff had failed to prove that either or both the drivers were negligent.

Case referred to:—

(1) *Eva* v. *Reeves* [1938] 2 K.B. 393.

FEDERAL COURT.

K.E. Hilborne for the 1st appellant, (2nd defendant).

Yap Tyou Min for the 2nd appellant, (1st defendant).

H.E. Cashin for the respondent, (plaintiff).

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): On the morning of the 10th of July, 1966, a Sunday, the plaintiff was a passenger in a taxi driven by the 2nd defendant which was proceeding in a southerly direction along Dunearn Road, a one-way carriageway. At the same time the 1st defendant was driving a motor lorry laden with sand in a westerly direction along Whitley Road which was a dual carriageway. The two vehicles collided with each other in the middle of the junction of these two roads and as a result of the collision the plaintiff suffered a severe injury, namely a compound fracture dislocation of the left elbow joint. That junction is a controlled junction, controlled by traffic lights operating automatically.

The plaintiff commenced an action in the High Court of Singapore naming the driver of the motor lorry as the 1st defendant and the driver of the taxi in which he was travelling as the 2nd defendant alleging that the collision was caused by the negligence of the 1st defendant and by the negligence of the 2nd defendant or alternatively, by the negligence of one or other of them in the driving of their respective motor vehicles.

The particulars of negligence alleged against the lorry driver, the 1st defendant, in the statement of claim were as follows:—

(a) Failing to keep any or any proper lookout.

(b) Driving at an excessive speed in the circumstances.

(c) Driving from a minor road on to a major road when it was unsafe so to do and without regard for traffic on the major road.

(d) Failing to give any or any proper warning of his approach and of his intention to drive on to the said major road.

(e) Failing to give way to vehicles travelling on his right.

(f) Failing to apply his brakes in time or at all or so to steer or control his lorry as to avoid the said collision.

(g) Driving against the traffic lights.

The particulars of negligence alleged against the taxi driver, the 2nd defendant, in the statement of claim were as follows:—

(a) Failing to keep any or any proper lookout.

(b) Driving at an excessive speed in the circumstances.

(c) Failing to give any or any proper warning of his approach.